No. 50533-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Luis Soriano,

Appellant.

Cowlitz County Superior Court Cause No. 16-1-01353-5

The Honorable Judge Marilyn K. Haan

Appellant's Opening Brief

Sean Downs
Grecco Downs PLLC
500 W. 8th Street, Suite 55
Vancouver, WA 98660
(855) 309-4529

Jodi R. Backlund
Manek R. Mistry
BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Mr. Soriano was charged by information with one count of Attempting to Elude a Pursuing Police Vehicle with a special allegation of endangering one or more persons other than the defendant or pursuing law enforcement officer, alleged to have occurred on August 20, 2016. CP 1. The case proceeded to jury trial on June 15, 2017. RP 4.

Castle Rock Officer Jeff Gann testified that he was on duty on August 20, 2016, wearing his police uniform and operating a marked patrol vehicle equipped with lights and siren. RP 54-56. Ofc. Gann received a dispatch that a Washington State Patrol unit was attempting to overtake two motorcycles on Interstate 5. RP 57. Ofc. Gann proceeded to I-5 and subsequently viewed two motorcycles approaching him in his rearview mirror at a high rate of speed. RP 58-59.

The officer then got behind the motorcycles and activated his overhead lights and siren. RP 60. The roadways were dry, the weather was clear, and it was roughly 5:50pm when this incident occurred. RP 56, 79. The black motorcycle's rider then looked back over the rider's shoulder and the black motorcycle's speed increased. RP 62. The officer testified that he assumed that that rider was looking back at him, stating "I'm assuming that he was looking back to see if I was actually behind him". RP 62.

The defense objected that this was speculative testimony, but was overruled. RP 62. The following day at trial, the judge informed the parties that she had reviewed the record regarding the defense's objection on speculation grounds and she admitted that she misheard what the testimony was. RP 120. The parties made additional argument, but the judge upheld her previous ruling. RP 122.

Ofc. Gann testified that the motorcycle he was pursuing swerved between cars and passed between cars on the broken white line on the roadway. RP 63. The patrol vehicle was travelling at 100 miles per hour, but the motorcycle was outpacing the patrol vehicle. RP 64. The motorcycle then exited I-5 at exit 52. RP 65. Ofc. Gann lost sight of the motorcycle when it was at the top of the offramp about one quarter of a mile away. RP 66, 84. After Ofc. Gann exited the freeway and he observed a parked vehicle with the driver pointing towards Burma Road. RP 67.

Ofc. Gann traveled down Burma Road and then observed what appeared to be the same motorcycle crashed near a Weyerhaeuser truck facility. RP 67-68, 73. He located an injured person measured at approximately forty feet from the motorcycle. RP 69, 74. Ofc. Gann identified the injured person as Mr. Soriano through a driver's license

obtained from his person. RP 75. He was transported from the scene by ambulance. RP 74.

Before beginning its case in chief, the defense made an offer of proof that Mr. Soriano would testify that he had five separate incidents where he was pulled over by law enforcement and that he pulled over as instructed without any issues and that this was his habit when being contacted by law enforcement. RP 124. The State objected, and the court excluded this evidence as irrelevant inadmissible character evidence. RP 125-126. Likewise, the court prevented defense witnesses from testifying that they all, including Mr. Soriano, have the habit of pulling over for law enforcement. RP 131.

Luis Alvarado testified that he is friends with Mr. Soriano and they ride motorcycles together on occasion. RP 134. On August 20, 2016, they and another person named Rony were riding on I-5 north to Seattle. RP 135, 136. He did not see any officers around and he did not hear a siren or see an officer's lights. RP 135, 141. He noticed in his side-view mirror that Mr. Soriano exited at exit 52. RP 135, 140. He did not see Mr. Soriano later that day. RP 137. Sometime later, Mr. Soriano explained that he had taken the exit to look for something to drink and a white car had swerved near him and he crashed. RP 137-138.

Rony Pineada testified that he is friends with Mr. Soriano and rides motorcycles with him on occasion. RP 142-143. He was on a ride with Mr. Soriano and Mr. Alvarado on August 20, 2016. RP 143. Mr. Pineada did not notice any officers or lights or sirens. RP 144. He explained that it is much louder riding a motorcycle than travelling inside of a vehicle because of the tires on the road and the engine, amongst other things. RP 147. He also explained that motorcycle mirrors only look in the blind spot and not very far behind. RP 146.

Mr. Soriano testified that he was riding with his friends Mr. Pineada and Mr. Alvarado. RP 150. Mr. Soriano explained that when wearing a helmet, there is limited vision out of it. RP 152. He would not be able to see a vehicle a quarter mile behind. RP 154. When changing lanes, he would signal and turn his head to look in his blind spot. RP 153. He did not see or hear any police lights or sirens, nor did he see any police officers. RP 153.

Mr. Soriano told the jury he was running low on gas and was really thirsty, so he took an exit. RP 150. It was 90 degrees outside and he did not have an opportunity to eat or drink before the ride because he was working on his motorcycle. RP 151-152. When he took exit 52, he turned towards what appeared to be a convenience store, but what turned out to be an RV park store. RP 156. Mr. Soriano used his phone to try and

navigate back to the freeway, but he ended up going on a highway that was parallel. RP 156. Mr. Soriano passed a car that was stopped in the road and then his bike slipped and he crashed. RP 157. He sustained injuries of a broken thumb and a piece of tree branch punctured his stomach, for which an ambulance was unnecessary. RP 161, 165. Mr. Soriano explained that only plastic pieces broke off his motorcycle and that the tank was already damaged. RP 163-164.

In closing argument, the State emphasized that Ofc. Gann observed Mr. Soriano look behind him a couple of times. RP 200. The defense argued in closing that the conduct in failing to pull over was not willful and Mr. Soriano had a very narrow perspective with his helmet on. RP 210-211.

The main issue for the jury to decide was whether Mr. Soriano knew there was an officer behind him or not. RP 216, 218. The State argued in rebuttal that Mr. Soriano's version of events were not to be believed and that "the explanation out of the Defense side of that is it's just a bunch of baloney…I mean, come on". RP 224. Defense counsel did not object. RP 224.

The jury subsequently found Mr. Soriano guilty of Attempt to Elude and found the endangerment special verdict in the affirmative. RP 232.

At sentencing, the parties agreed that Mr. Soriano had no prior criminal history, that his offender score was a 0, his standard sentencing range was 0 to 60 days, and the enhancement was 12 months plus one day. RP 239. Defense counsel asked for 0 days in jail, with the assumption that the 12 months plus one day enhancement had to be imposed by the court. RP 240. The court ultimately sentenced Mr. Soriano to 10 days plus the enhancement for 12 months plus one day, without consideration of the first-time offender waiver statute. RP 241; CP 22-33.

This timely appeal follows.

ARGUMENT

I. THE COURT COMMITTED REVERSIBLE ERROR BY IMPERMISSIBLY ALLOWING SPECULATIVE OPINION TESTIMONY THAT MR. SORIANO LOOKED AT OFC. GANN.

An appellate court reviews evidentiary rulings for abuse of discretion. *State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *State v. Embry*, 171 Wn. App. 714, 731-32, 287 P.3d 648 (2012).

ER 602 indicates that "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." ER 602. A lay opinion is admissible under Rule 701 only if it is "rationally based upon the perception of the

witness." ER 701. This provision makes it clear that the requirement of firsthand knowledge under Rule 602 applies even though the witness is allowed to testify in the form of an opinion. 5B *Wash. Prac., Evidence Law and Practice* § 701.3 (6th ed.). For example, in a prosecution for Attempt to Elude, the Court of Appeals held that an officer should not have been allowed to testify that defendant's driving "exhibited to me that the person driving the vehicle was attempting to get away from me and knew I was back there and [was] refusing to stop." The court ruled that the officer should have confined his testimony to what he saw and heard and should have avoided speculation about defendant's state of mind. *State v. Farr-Lenzini*, 93 Wn. App. 453, 458, 970 P.2d 313 (1999).

Because it is the jury's responsibility to determine the defendant's guilt or innocence, no witness, lay or expert, may opine as to the defendant's guilt, whether by direct statement or by inference. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967). Such an opinion would invade the jury's independent determination of the facts and violate the defendant's constitutional right. *State v. Carlin*, 40 Wn. App. 698, 701, 700 P.2d 323 (1985). Further, the closer the tie between an opinion and the ultimate issue of fact, the stronger the supporting factual basis must be. *Farr-*

Lenzini, 93 Wn. App. at 460 (citing 1 Strong, et al., *McCormack [sic] on Evidence* § 12 (4th ed.1992)).

Police officers' opinions on guilt, whether direct or by inference, are particularly objectionable in criminal cases. This is because, while they carry an "'aura of reliability,' they have "low probative value because [officers'] area of expertise is in determining when an arrest is justified, not in determining when there is guilt beyond a reasonable doubt." *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008).

Here, Gann did not have a sufficient factual foundation, or sufficient personal knowledge, to determine whether Mr. Soriano looked back at him. The officer indicated that Mr. Soriano looked back over his shoulder and the officer "assumed" that Mr. Soriano was "looking back to see if [Ofc. Gann] was actually behind him". RP 62. To "assume" is to take for granted without proof.[1] By its very definition and by the officer's own words, his statement was speculative and without proof.

Moreover, and more disturbingly, Ofc. Gann's testimony invaded the province of the jury because the testimony was an impermissible opinion regarding the essential element of knowledge. Ofc. Gann was the only witness for the state to testify as to any observations of Mr. Soriano,

[1] Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc. http://www.dictionary.com/browse/assume (accessed: February 12, 2018).

so the jury would consider his opinion with great weight. Just as the Court of Appeals found in *Farr-Lenzini*, *supra*, that an officer's statement that the defendant knew he was "back there" was improper, Ofc. Gann inferred guilt here. He did this by stating that Mr. Soriano was looking behind him to see if the officer was there.

Ofc. Gann did not have a basis to know what Mr. Soriano did or did not see. Mr. Soriano was wearing a helmet with a sunshade and the two did not make eye contact. Further, there was contrasting testimony indicating that motorcycle riders can look to their blind spots behind them, but it is exceedingly difficult for them to look completely behind them. Ofc. Gann's statement is exactly the type of statement that is prohibited – speculative testimony that invades the province of the jury. *Farr-Lenzini*, 93 Wn. App. at 458; *Black*, 109 Wn.2d at 348.

Given the above, the court committed reversible error by admitting Ofc. Gann's improper, speculative opinion.

II. THE COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO ALLOW MR. SORIANO TO TESTIFY TO PRIOR LAW ENFORCEMENT CONTACTS.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or

routine practice. ER 406. The determination of whether evidence is admissible is within the discretion of the trial court. *State v. Thompson*, 73 Wn. App. 654, 659, 870 P.2d 1022 (1994).

The habit in question must be just that: "[o]ne's regular response to a repeated specific situation so that doing the habitual act becomes semi-automatic." *See* Official Comment on ER 406, Judicial Council Task Force on Evidence (1978). Habit denotes one's regular response to a repeated situation – it is a person's regular practice of responding to a particular kind of situation with a specific type of conduct. 5D Wash. Prac., *Handbook Wash. Evid. ER 406* (2017-2018 ed.) (citing Broun et al., *McCormick on Evidence* § 195 (6th ed. 2006)).

In the instant case, Mr. Soriano wanted to testify to his regular practice of responding to a particular situation (law enforcement signaling for him to stop) with a specific type of conduct (pulling over his motor vehicle). Every single time that Mr. Soriano has been signaled to stop in the past, he has had the same response of pulling his vehicle over. This is a habit that has been established over numerous prior contacts with law enforcement, which makes it admissible under ER 406. 5D Wash. Prac., *Handbook Wash. Evid. ER 406* (2017-2018 ed.)

The trial court impermissibly denied admission of Mr. Soriano's habit evidence. Accordingly, his conviction must be reversed and remanded for a new trial.

III. THE STATE COMMITTED FLAGRANT PROSECUTORIAL MISCONDUCT BY STATING THAT MR. SORIANO'S TESTIMONY WAS "BALONEY".

"Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt." *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940, 944 (2008). The constitutional harmless error standard applies when a prosecutor's comment implicates a constitutional right other than the right to a fair trial. *State v. Moreno*, 132 Wn.App. 663, 671–72, 132 P.3d 1137 (2006). A constitutional error is only harmless when the reviewing court is convinced, beyond a reasonable doubt, that the prosecutor's comment did not affect the verdict. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The reviewing court presumes constitutional errors to be prejudicial and, as such, the State bears the burden to show the error was not harmless. *Guloy*, 104 Wn.2d at 425. However, if the defendant failed to object in the trial court, then the defendant must demonstrate that these comments were so flagrant or ill-intentioned that an instruction could not have cured the prejudice. *State v. Hopson*, 113 Wn.2d 273, 287, 778 P.2d 1014 (1989).

The appellant must show that the prosecutor's conduct was improper and prejudiced his right to a fair trial. *State v. Boehning,* 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Prejudice is established where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." *State v. Dhaliwal,* 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting *State v. Pirtle,* 127 Wn.2d 628, 672, 904 P.2d 245 (1995), *cert. denied,* 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996)).

In *U.S. v. Gaspard,* 744 F.2d 438 (5th Cir, 1984), the United States Court of Appeals found that the admission of the prosecutor's closing argument describing a letter that the defendant presented was a "fraud" and was "bogus" was error. *See also State v. Hale*, 26 Wn. App. 211, 611 P.2d 1370 (1980) (prosecutor's argument in closing that defendant and defendant's witnesses were liars was error); *State v. Martin*, 41 Wn.App. 133, 703 P.2d 309 (1985) (prosecutor's argument that impugned defense expert's integrity by characterizing testimony as "fabrication" was error). Moreover, a prosecutor may not disparage defense counsel's argument. *State v. Thorgerson,* 172 Wn.2d 438, 451, 258 P.3d 43, 51 (2011).

It is also impermissible for a prosecutor to express a personal opinion as to the credibility of a witness or the guilt of a defendant. *State v. Lindsay*, 180 Wn.2d 423, 437, 326 P.3d 125, 132–33 (2014) (citing *State v. Reed,* 102 Wn.2d 140, 145, 684 P.2d 699 (1984); Am. Bar Ass'n,

Model Code of Professional Responsibility and Code of Judicial Conduct § DR 7406(C)(4) (1980)). It constitutes misconduct and violates the advocate-witness rule, which "prohibits an attorney from appearing as both a witness and an advocate in the same litigation." *Id* (quoting *United States v. Prantil*, 764 F.2d 548, 552-53 (9th Cir.1985)).

"Although argument does not constitute evidence and the jury is instructed not to consider it as such, the use of dramatic, compelling, or even inflammatory argument reflects a perception that argument is a valuable ingredient of the deliberative process[.]" J. Thomas Sullivan, Prosecutor Misconduct in Closing Argument in Arkansas Criminal Trials, 20 U. ARK. LITTLE ROCK L. REV. 213, 214 (1998). And this perception is supported by scientific evidence. "Empirical research on the 'recency effect' suggests that people tend to remember best and be influenced by the latest event in a sequence more than by earlier events." Mary Nicol Bowman, *Mitigating Foul Blows*, 49 GEORGIA L. REV. 309, 329 (2015). Further, because jurors enter deliberations with the prosecutor's rebuttal argument still ringing in their ears, those words could have more impact than the actual evidence presented much earlier in the case. *See* Welsh White, *Curbing Prosecutorial Misconduct in Capital Cases: Imposing Prohibitions on Improper Penalty Trial Arguments*, 39 AM. CRIM. L. REV. 1147, 1149 (2002) ("[I]n most cases, the

prosecutor's final closing argument will be the last words that the . . . jury hears from either attorney.").

In the instant case, the prosecutor essentially called Mr. Soriano a liar during closing arguments by saying that Mr. Soriano's testimony was "baloney". Another term for that would be foolishness or nonsense.[2] This is a flagrant appeal to the passion and prejudice of the jury. Further, the prosecutor disparaged defense counsel's argument by specifically stating "the explanation out of the Defense side of that is it's just a bunch of baloney". RP 224. Moreover, this was impermissibly expressed as a personal opinion by the prosecutor as evidenced by the prosecutor using the dismissive personal phrase "I mean, come on" when referring to Mr. Soriano's testimony and describing what parts of Mr. Soriano's testimony the prosecutor would personally believe or not believe by stating "I'll go along with that". RP 224.

Mr. Soriano indicated that he took Exit 52 because he needed to get a drink of water and was looking for a rest stop or gas station. The State called his testimony a "bunch of baloney" in closing rebuttal. This was prejudicial to Mr. Soriano's case because there was only one witness for the State that observed Mr. Soriano – namely, Ofc. Gann – and there

[2] Dictionary.com. Dictionary.com Unabridged. Random House, Inc. http://www.dictionary.com/browse/baloney (accessed: February 12, 2018).

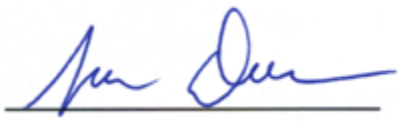
was only one witness for the defense that could explain why he exited the freeway – namely, Mr. Soriano.

Given the foregoing, the State's flagrant and ill-intentioned statements in closing argument could not have been cured with an instruction. *See Thorgerson*, 172 Wn.2d at 451; *Lindsay*, 180 Wn.2d at 437. Accordingly, Mr. Soriano's conviction must be reversed and remanded for a new trial.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this reverse the conviction and remand to the Superior Court for a new trial.

Respectfully submitted on February 16, 2018,



Sean M. Downs, WSBA No. 39856
Attorney for the Appellant

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Luis Soriano, DOC #400186
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
appeals@co.cowlitz.wa.us
tom.ladouceur@co.cowlitz.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 16, 2018.

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

February 16, 2018 - 3:15 PM

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Superior Court Case Number:	16-1-01353-5

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